

## Jackson, Suzanne

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**From:** Boxerman, Samuel B. [sboxerman@sidley.com]  
**Sent:** Tuesday, April 23, 2013 10:04 AM  
**To:** Nurkin, Gary  
**Cc:** Ron.Rodrique@aes.com; marc.michael@aes.com; Buente Jr., David T.; slowrance@verizon.net; Sawyer, William; Meyer, George; Grossman, Lenny  
**Subject:** AES Puerto Rico  
**Importance:** High

Gary –

On behalf of AES Puerto Rico, I am writing to respond to your email of April 18, 2013.

We welcome your statement that EPA is now reviewing the comments that we sent to the agency on behalf of AES Puerto Rico on January 10, 2013, relating to the use of two Leaching Environmental Assessment Framework (LEAF) test methods to analyze the AGREMAX produced at AES Puerto Rico's facility. We believe very strongly that our comments demonstrate the fundamental flaws inherent in these two methods, EPA's application of these methods to AGREMAX and the EPA report. We await EPA's response. We likewise await EPA's responses to our proposal of February 5, 2013 and our letter of the same date.

However, we must reiterate our disappointment that despite the Region's previous representation, the agency did not even consider AES Puerto Rico's comments before publishing its LEAF report. We fail to see what the sudden rush was that required EPA to publish a report regarding AGREMAX without even considering a key stakeholder's comments – despite our understanding that EPA was providing the report to AES Puerto Rico as part of the review process. EPA often takes months if not years to evaluate far less complex data. Yet, without any apparent reason, and without any prior notice, EPA chose to move a draft report to rapid publication.

Moreover, we do not understand how EPA's Office of Research and Development ("ORD")'s review process here could be considered "routine." As you know, there is nothing "standard" about the circumstances at issue. This is not a general research effort by ORD. EPA generally has an entirely separate review of coal combustion products – a review that EPA has repeatedly told the public and the U.S. Court of Appeals for the D.C. Circuit is so difficult that it is taking years to complete.

Rather, as you know, we are in an enforcement context where EPA has threatened to issue an enforcement order to AES Puerto Rico under RCRA §7003 and an NGO has threatened to sue the company under RCRA § 7002. We are in this context because EPA Region 2 Enforcement visited Puerto Rico and identified alleged concerns – concerns AES Puerto Rico strongly

disputes – about the use of a material produced by one facility in one location. Enforcement staff then returned to Puerto Rico and collected samples of the material. Enforcement staff then asked ORD to perform LEAF testing - a novel test method never used before by anyone in EPA for any purpose so far as we can tell, let alone for an enforcement action against a single facility. Enforcement staff then asked ORD to prepare a report comparing the results to reference concentrations provided by enforcement staff – precisely the approach EPA cautioned against in its 2010 proposed rule on coal ash. None of this suggests a “standard” ORD research process , but an enforcement-driven report that has now been published on EPA’s website without any consideration of the comments of the stakeholder that manufactures AGREMAX and is the subject of this enforcement effort before publication of the report. For that reason, we again ask EPA to return this document to draft and remove it from its website while the agency considers AES Puerto Rico’s comments.

Lastly, your email states that the review “process included peer review by academic or technical experts in the field, as well as quality assurance reviews.” (The draft report that you provided to us had similar language, stating that “Prior to publication, this report will be subjected to the Agency’s peer and administrative review to be approved for publication as an EPA document.”) We are very interested in understanding the full nature of this review process and would request that EPA provide copies of all documents prepared as part of that process, including, without limitation, comments and communications by anyone to and from ORD that relate in any way to that process.

Thank you.

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**From:** Nurkin, Gary [mailto:Nurkin.Gary@epa.gov]  
**Sent:** Thursday, April 18, 2013 4:54 PM  
**To:** Boxerman, Samuel B.  
**Cc:** Sawyer, William; Meyer, George; Grossman, Lenny  
**Subject:** AES

Sam:

I am writing to respond to your email of April 11, 2013. EPA appreciates that AES travelled to NY on December 17, 2012 and is potentially interested in resolving issues relating to the generation and handling of Agremax. EPA hopes that AES will continue to work with EPA to resolve these matters.

EPA is reviewing the comments that you sent to EPA on January 10, 2013, relating to the use of the Leaching Environmental Assessment Framework (LEAF) test to analyze the Agremax produced at the AES Guayama facility in Puerto Rico. EPA believes that those January comments primarily focused on the application of the LEAF test and not on the test methods or methodology inherent in LEAF. EPA intends to respond to your January comments at a later time.

As to your comments in your April 11, 2013 email regarding EPA's publication of "Leaching Behavior of "AGREMAX" Collected From a Coal-Fired Power Plant in Puerto Rico" (EPA 600/R-12/724, December 2012), that report went through EPA's Office of Research and Development's (ORD) standard review process before being published in December 2012 and posted on ORD's website. That process included peer review by academic or technical experts in the field, as well as quality assurance reviews. As is normally the case with technical reports that EPA produces, it is a public record and thus was posted on ORD's website for the benefit of the public. As such, we do not see a reason, at this time, to recommend to ORD that it take down that posting or withdraw the report.

As to LEAF, test methods 1313 and 1316 were published in SW-846 in September and October 2012, respectively, after being validated. Test methods 1314 and 1315, too, have gone through peer review and been validated, and will soon be added to SW-846. I am told that following the posting of methods 1314 and 1315, EPA will issue a Notice of Data Availability (NODA) that will be published in the Federal Register, seeking comments on these four methodologies. AES will be free to submit comments regarding these methodologies once the NODA is published.

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